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No. 87-2048

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals For the Ninth Circuit

**MOTION FOR LEAVE TO FILE AND BRIEF OF
THE NATIONAL COALITION OF PETROLEUM
RETAILERS AS AMICUS CURIAE IN SUPPORT OF
THE POSITION OF RESPONDENT**

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**MOTION OF THE NATIONAL COALITION OF
PETROLEUM RETAILERS FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE***

The National Coalition of Petroleum Retailers ("NCPR") hereby seeks leave pursuant to Supreme Court Rule 36.3 to file the attached brief as *amicus curiae* in support of Respondents, Ricky Hasbrouck, d/b/a Rick's Texaco, et al. The consent of the attorney for respondents has been obtained. However, attorney for petitioner has refused to consent to the filing of a Brief *Amicus Curiae* by NCPR.

The National Coalition of Petroleum Retailers ("NCPR") is a coalition of independent gasoline retailer trade associations representing over 20,000 in-

dependent service stations in the states of Georgia, Pennsylvania, New Jersey, New York, Connecticut and Florida. NCPR is concerned with preserving the viability of independent gasoline retailers in the areas in which they serve and indeed, in the entire United States. It is seeking to protect and defend the existence of independent gasoline retailers by working primarily in the legislative and legal areas. In that regard, NCPR sponsors appropriate legislation both at a state and federal level and supports lawsuits where the interests of its members are affected. In addition, the constituent associations work directly with representatives of refiners and wholesale distributors (hereinafter "jobbers") in dealing with the individual problems of their members.

One of the primary concerns of NCPR is the decline in the number of independent gasoline dealers in the past decade from approximately 200,000 to approximately 100,000. In the meantime, the role of the jobber has increased sharply.

One of the significant factors in the decline of independent retailers has been the substantial discounts given by their refiner suppliers to jobbers, often selling the same brand of gasoline through their own retail outlets. This places the independent dealer, who is attempting to compete with the jobber dealers, at a significant price disadvantage which adversely affects competition in the relevant market.

Dealer groups have been attempting for the past six or seven years to alert legislative bodies to these problems. The independent dealer depends on the provisions of the Robinson-Patman Act for protection against the anticompetitive effects of the type of price discriminations which are the core of this case. Its

outcome, therefore, will substantially and directly affect the independent gasoline dealers represented by NCPR. As such, their interest is direct and substantial.

The NCPR's motion for leave to file an *amicus curiae* brief should be granted.

Respectfully submitted,

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Dated: September 6, 1989

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BRIEF OF THE NATIONAL COALITION OF
PETROLEUM RETAILERS AS *AMICUS CURIAE*
SUPPORTING RESPONDENTS

This brief is submitted on behalf of the National Coalition of Petroleum Retailers ("NCPR") as *amicus curiae* in support of respondent.

STATEMENT OF INTEREST

NCPR is a coalition of independent gasoline retailer trade associations representing over 20,000 independent dealers in the states of Georgia, Pennsylvania, New Jersey, New York, Connecticut and Florida. NCPR is concerned with preserving the viability of

independent gasoline retailers in the areas in which they serve and indeed, in the entire United States. It is seeking to protect and defend the existence of independent gasoline retailers by working primarily in the legislative and legal areas. In that regard, NCPR sponsors appropriate legislation both at a state and federal level and supports lawsuits where the interests of its members are affected. In addition, the constituent associations work directly with representatives of refiners and wholesale distributors (hereinafter "jobbers") in dealing with the individual problems of their members.

One of the primary concerns of NCPR is the decline in the number of independent gasoline dealers in the past decade from approximately 200,000 to approximately 100,000. In the meantime, the role of the jobber has increased sharply. See Brief for *Amicus Curiae* Petroleum Marketers Association of America, at 2 n.2.

The market in this case has aspects which make the practices involved particularly pernicious to NCPR and its members. First, the market is strongly price-sensitive, and small price advantages, such as a penny a gallon at retail, can cause significant customer swings. Second, the independent branded retailer cannot shift suppliers to take advantage of a cheaper supply because of its franchise relationship with the refiner-supplier who sells it gasoline at what is known as the Dealers' Tankwagon ("DTW") price. This same refiner-supplier may also, however, be competing with the independent branded retailer through its own retail stations.¹ In addition, the same refiner-supplier

¹ A side effect of this structure is that the refiner-supplier,

may be selling to a jobber who also operates retail stations in competition with the same independent branded retailers. A common complaint of independent branded retailers in such markets is that the jobber-dealer, because of the jobber discount, is able to sell gasoline at retail at a price less than the DTW price to the independent branded dealer. The result is, of course, that the jobber discount places the independent branded dealer at a severe competitive disadvantage. Indeed, NCPR considers the jobber discount to be a significant factor in the loss of approximately 10,000 independent dealer stations per year for the past ten years. Such a loss must adversely affect competition by reducing the options previously available to motorists.

Dealer groups have been attempting for the past six or seven years to alert legislative bodies to these problems. However, the most significant dealer legislation in the past decade—the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*—did not address this problem because the Congress considered it to be primarily a matter within the purview of the Robinson-Patman Act, 15 U.S.C. § 13 *et seq.*² (hereinafter, "Act"). The independent dealer, therefore, must look to the Act for protection against the anticompetitive effects of the type of price discrimination which is the core of this case. Its outcome,

because of its presence in the retail market, is fully knowledgeable as to the effects of its wholesale pricing and distribution methods. It is naive, therefore, to assert that Texaco was not knowledgeable as to pricing occurring in retail markets.

² See Petroleum Marketing Practices: Hearing on H.R. 130, H.R. 274, H.R. 468, H.R. 511, and H.R. 3478, 95th Cong., 1st Sess. at 283 *et seq.* (1977).

therefore, will substantially and directly affect the independent gasoline dealers represented by NCPR. As such, NCPR's interest is direct and substantial.

SUMMARY OF ARGUMENT

The findings of the lower courts and the jury make clear that the price discriminations involved in this case are trade discounts, not functional discounts, and, as such, violate the Act. Utilizing traditional functional discount analysis, the price discriminations also violate the Act because the jobbers in this case performed no "functions" other than delivery to their retail outlets for which they were separately compensated by Texaco. The record below further demonstrates that plaintiffs (collectively hereinafter "Hasbrouck") repeatedly informed Texaco that the trade discounts were passed on to competing retailers who could then sell gas at or below the DTW price Texaco charged Hasbrouck. Consequently, Texaco knowingly discriminated in price between competing retailers over a sustained period of time and clearly denied Hasbrouck the equality of competitive opportunity which the Act was expressly designed to afford.

Texaco now is seeking, despite the record below, the judicial creation of an absolute defense for "functional" and "trade" discounts which Congress refused to create. It should not be allowed to succeed.

The decisions below strike the balance required by the Act between permitting legitimate functional discounts reflecting cost saving services provided by favored jobbers and forbidding unjustified price discrimination through trade discounts unrelated to

any legitimate cost savings provided by the favored jobbers.

Given the facts of this case; the nature of competition in the gasoline marketing business; the express language of the Act; the failure of Texaco to assert defenses available to it or to negate Hasbrouck's evidence of causation; and the absence of evidence showing the favored jobbers performed any functions justifying the discount; this Court should affirm the decision of the Ninth Circuit.

ARGUMENT

I. The Decision Below Correctly Refuses To Create A Defense Based on Functional Or Trade Discounts To A Robinson-Patman Discrimination When Congress Expressly Refused To Do So, And Where The Discount Is Knowingly Given, Not Cost-Justified And Injures Competition.

The lower courts have determined that the jobber discounts extended by defendant Texaco, Inc. ("Texaco") in this case have injured competition, that the discounts were not justified by cost savings and that the discounts were not compensating the jobber for performing a function which otherwise would have been performed by the supplier. The primary function performed by the jobber was to transport gasoline from the tank yard of the supplier to its own stations. For this function, however, the jobbers received a special hauling allowance in addition to the jobber discount.

The lower courts and a jury found that Texaco knowingly gave, over a sustained period of time, trade discounts to dual distributing jobbers in the Spokane,

Washington gasoline market.³ The favored jobbers were supplied gasoline at prices ranging from 2.5 to 5.7 cents per gallon below the price charged Hasbrouck over several years. The findings by the jury, the district court, and court of appeals include that: (1) there was no relationship between the functions performed by the favored jobbers and the amount of the discount; (2) at least one of the favored jobbers performed no functions justifying the discount but was simply engaged in "paper transactions" for Texaco; (3) one of the jobbers was a dual distributor and Texaco delivered product directly to the favored jobber's customers; and (4) Texaco made no serious attempt to provide a quantitative justification for its discount to both of the favored jobbers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1039; 634 F.Supp. 34, 38. (E.D. Wash. 1985).⁴

Therefore, this case comes to this Court on a record that Texaco was not engaged in granting a legitimate "functional discount" to jobbers performing valuable services. Instead, this case comes to this Court on a clear record establishing that Texaco was granting a lower price to favored jobbers unrelated to any significant functions performed by them. The record be-

³ A "dual distributing" wholesaler is one who functions both as a wholesaler and as a retailer and, thus, competes with independent retailers such as Hasbrouck.

⁴ Texaco separately reimbursed the favored jobbers for delivery costs by a hauling allowance, and the trial court excluded the hauling allowance from its calculation of the price difference. 634 F.Supp. at 38, n. 5. No serious attempt beyond identifying vague functions like "marketing and advisory" functions performed by the favored jobbers was made by Texaco to justify the discount in the court below. *Id.*

low proved conclusively that the discount given the favored jobbers resulted in lower prices to Hasbrouck's competitors and denied Hasbrouck equality of competitive opportunity in violation of the Act.

This case, therefore, is on all fours with *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). Texaco, however, has attempted to distinguish *Perkins* based on Hasbrouck's status as a retailer, the favored customers' status as jobbers and a claimed right to be free, under the Act, to give functional or trade discounts. In *Perkins*, the plaintiff was an integrated jobber claiming injury to its retail stations as the result of lower prices charged by competing retail stations served by a competing jobber who received lower wholesale prices. Those discounts were passed on to its retail customers through several levels of distribution. The factual distinction between this case and *Perkins*, therefore, is a distinction without a difference.

Economists and others generally draw a distinction between "functional discounts" and "trade discounts." A functional discount is a discount offered by a manufacturer to a purchaser for assuming and performing a function that would otherwise be performed by the manufacturer. A trade discount is a discount given to purchasers on the basis of the level of trade at which they operate. A trade discount depends solely on to whom the purchaser resells; it is entirely independent of marketing functions performed by the purchaser.

Based on the findings below, therefore, the discounts were not functional in nature, but rather, trade discounts having no necessary relation to any functions being provided by the favored jobber-retailers.

The discounts directly and inevitably resulted in serious competitive injury to Hasbrouck at the retail level of the market in violation of the Act and were a form of economic price discrimination contrary to good economic policy generally.⁵

The repeated characterization by Texaco and its amici of the kind of discount given in this case as a "functional" discount ignores the record evidence that the discount bore no relation to the performance by the favored jobbers of discrete functions. Quite simply, it was found below that the jobbers undertook no "functions" other than delivery functions for which they were separately compensated. The record below further demonstrates that Hasbrouck repeatedly informed Texaco that the trade discounts resulted in arbitrary discounts to competing retailers who could sell gas at or below the DTW price Texaco charged Hasbrouck. Consequently, Texaco knowingly discriminated in price among competing retailers over a sustained period of time and clearly denied Hasbrouck the equality of competitive opportunity that the Act was expressly designed to afford. Given the record evidence, this case should be resolved on the basis

⁵ The use of trade discounts rather than functional discounts is often contrary to economic efficiency and can freeze outmoded and inefficient methods of distribution. There is no necessary relation between the trade discount and any functions provided by the recipient of the discount. Vertical integration forward or backward to more efficiently distribute goods can be frustrated where discounts are not related to the assumption of functions or efficiencies realized by vertical integration. Celnicker & Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act*, 7-8 (1988) (unpublished manuscript on file with the Solicitor General of the United States), (forthcoming *Utah L. Rev.*, Nov. 1989).

that only trade discounts are involved which have no relationship to any of the defenses included in the Act.

Traditional functional discount analysis leads to the same conclusion. The Act, either explicitly or implicitly, provides at least five "defenses" which could have absolved Texaco of liability: (1) If the discounts were true functional discounts, Hasbrouck would not have been able to show that the discounts "caused" competitive injury. Proof that the lower price to favored customers reflected the assumption of costs normally borne by Texaco would defeat proof that the price difference caused Hasbrouck's injury of the sort proscribed by the Act;⁶ (2) If the favored customers did absorb legitimate costs and the functional discount reasonably reflected the assumption of costs, any damages suffered by Hasbrouck would not be damages of the sort the antitrust laws were intended to prevent;⁷ (3) An absence of "competitive injury" has also been recognized where the discounts are generally and practically available to competitors of the favored customer;⁸ (4) If the discounts reflected legitimate costs absorbed by favored jobbers, Texaco had an absolute defense of cost justification under the

⁶ See *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127 (D.C. Cir. 1988).

⁷ See *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.), cert. denied, 459 U.S. 908 (1982).

⁸ See *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2nd Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *Boise Cascade Corp. v. F.T.C.*, 837 F.2d 1127, 1130 (D.C. Cir. 1988).

proviso to section 2(a) of the Act;⁹ and, (5) If the discounts were given to meet competing offers to the wholesalers, Texaco had available the absolute defense of meeting competition under section 2(b) of the Act.¹⁰ However, the courts below found that Hasbrouck did, in fact, suffer injury of the sort proscribed by the Act; that the favored jobbers did not perform any additional legitimate functions; and that, factually, the other defenses were not appropriate.

Texaco and *amici curiae* supporting its position ignore these realities of the record below. Texaco seeks the judicial creation of an absolute defense for "functional" and trade discounts, which Congress itself has refused to create. Rather than deal with the facts of the case, the explicit requirements of the law Congress adopted and the realities of gasoline marketing, petitioner and its *amici* seek a most blatant form of judicial legislation—the judicial creation of an absolute defense for functional and trade discounts in the con-

⁹ 15 U.S.C. § 13(a):

Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery . . .

See *United States v. Borden Co.*, 350 U.S. 460 (1962).

¹⁰ 15 U.S.C. § 13(b):

Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser . . . was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

See *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951).

text of a statute where Congress expressly considered and refused to create such a defense.

As originally reported from both the House and Senate Judiciary Committees, the bills which became the Robinson-Patman Act expressly exempted from coverage under the Act any price difference related to the buyer's functional status in the distribution hierarchy. See, H.R. Rep. 2287, 74th Cong., 2d Sess., 8-9 (1936); S. Rep. 1502, 74th Cong., 2d Sess. 5 (1936). This exemption was then deleted from the final bill. Report of the Attorney General's National Committee to Study the Antitrust Law 202-204 (1955). Moreover, the same Congress which adopted the Robinson-Patman Act also amended the Clayton Act prohibition on price discrimination,¹¹ to eliminate the "quantity discount exemption." This amendment reflected the general concern of Congress with discounts which denied equality of competitive opportunity to small retailers. It has been persuasively argued that

since Congress elected not to address functional discounts directly in the Act, the le-

¹¹ The original Clayton Act provided: "[N]othing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold . . ." Act of October 15, 1914, ch. 323, sec. 2, 38 Stat. 730 (1914). The underlined exemption for quantity discounts was deleted by the Robinson-Patman Act amendment in 1936, reflecting Congressional concern for volume discounts detached from cost savings given large buyers and denied small buyers. The present proviso to Section 2(a) provides: "[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

gitimacy of the practice depends on the absence of anticompetitive effects or the presence of conventional defenses. This is the view adopted by the Federal Trade Commission and the courts.¹²

Congress paid great attention to the problem of functional discounts, seriously considered creation of an absolute defense for functional discounts and expressly refused to include a defense immunizing such a practice. While it may be accurate to claim that Congress did not intend to make illegal all functional discounts, it is also true that Congress did not intend to immunize functional discounts from scrutiny under the general standards of the Act. The United States' attempt to suggest that the failure to include an express exemption for functional discounts should be read as evidencing a Congressional intent to do so has a Catch-22 ring to it. Brief for the United States and the Federal Trade Commission as *Amicus Curiae* supporting Petitioners, at 23-25. Functional discounts, like other price differences which may or may not generate the prohibited anticompetitive effects at the primary, secondary or other level of a market, must be evaluated in terms of whether the requisite anticompetitive effect can be shown or whether there is a "meeting competition" or "cost justification" defense available in the circumstances of a particular case.

The lower courts in this case followed the express requirements of the statute and the policies which gave rise to it. They walked the fine line between

¹² ABA Antitrust Section, 1 The Robinson-Patman Act: Policy and Law 58 (1980).

improperly legislating an absolute defense for functional discounts (as demanded by Texaco and some *amici*) and creating a standard which would make impossible or impractical the legitimate use of functional discounts where they are a part of the competitive process in a particular industry.

The lower courts were aware that at one end of the spectrum of potential uses of functional discounts are those cases where a seller gives different prices to those providing different functions in the marketing of its goods and the difference in price reasonably approximates the cost of providing the functions. At the other of the spectrum are those cases where a price difference is given for no particular services and the claimed difference in function is fictional and a device for circumventing the prohibitions of the Act. In sorting through the facts of this case, it is apparent that this case is much closer to the latter end of the spectrum, an arbitrary trade discount, and not a legitimate functional discount, as the lower courts determined.

The lower court adopted a two-part test which distinguishes between legitimate and illegitimate functional discounts. The court held unlawful only those discounts (1) which are not cost-based and (2) are passed on to the jobber's retail customers. The first part of the test is similar to that adopted by the Federal Trade Commission in the leading case of *Doubleday & Co.*:¹³

Where a businessman performs various wholesale functions, such as providing stor-

¹³ 52 F.T.C. 169 (1955).

age, travelling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. . . .

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved should he qualify for a compensating discount. The amount of the discount would be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the goods for which he performs it.¹⁴

In this case, Texaco was given every opportunity over more than a decade of litigation to show that the amount of the discount was "reasonably related" to the expenses assumed by the buyer. Texaco not only failed to do so, it refused to do so on the ground that the courts should create the same exemption for "functional discounts" that Congress refused to enact.

The second part of the test adopted below, that the plaintiff prove that all or a part of the discount was passed on by the favored jobbers, is also consistent with the restrictive test adopted by the majority in *Boise Cascade Corp. v. F.T.C.*¹⁵ In that case, the circuit court moved away from this In that case, the circuit court moved away from this Court's holding in *F.T.C. v. Morton Salt Co.*¹⁶ that:

¹⁴ 52 F.T.C. at 209.

¹⁵ 837 F.2d 1127 (D.C. Cir. 1988).

¹⁶ 334 U.S. 37 (1948).

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.¹⁷

In *Boise Cascade*, the majority opinion permitted evidence that the price difference allowed Boise did not adversely affect competition to rebut the presumption that a substantial price difference over a sustained period of time necessarily injured competition within the meaning of the Act.

Texaco's practice is illegal under the test of *Morton Salt* since there was a substantial price difference allowed over a sustained period of time. Texaco's practice is also illegal under the more restrictive test of *Boise Cascade* since it was affirmatively shown that the price difference was passed on to retailers competing with Hasbrouck¹⁸ and that the resulting discrimination injured competition and caused Hasbrouck antitrust injury.¹⁹ Moreover, and as noted in the United States' *amicus* brief on the petition for certiorari stating that this case did not "merit review,"²⁰ the circuit court's opinion does not require

¹⁷ 334 U.S. at 50.

¹⁸ 842 F.2d at 1039-40.

¹⁹ 842 F.2d at 1040-41.

²⁰ Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari at 6 (May, 1989).

that Texaco monitor its jobbers' pricing but only holds Texaco liable for knowingly granting a trade discount injuring competition.

The decisions below strike the balance required by the Act between permitting legitimate functional discounts that reflect cost saving services provided by favored jobbers and discouraging unjustified price discrimination through trade discounts that are unrelated to any legitimate cost savings provided by the favored jobbers.

Consequently, given the facts in this case; the nature of competition in the gasoline marketing business; the express language of the Act; the failure of Texaco to assert successfully defenses available to it or to negate Hasbrouck's evidence of causation; and the absence of evidence showing the favored jobbers performed any functions justifying the discount; this Court should affirm the Ninth Circuit's decision.

CONCLUSION

What both Texaco and the United States seek is the opening of wide loopholes, through which any supplier can march, simply by establishing mechanically-defined classes of buyers that do not provide any legitimate function for the discount granted. This Court should not countenance such a judicial repeal of provisions of the Act which are crucial to the competitive viability of efficient small businesses.

Respectfully submitted,

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